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Thomas v. Arizona Public Service Co., 89-ERA-19 (Sec'y Sept. 17, 1993)

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DATE: September 17, 1993
CASE NO. 89-ERA-19

IN THE MATTER OF

SARAH THOMAS,

COMPLAINANT,

v.

ARIZONA PUBLIC SERVICE CO.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review is the Recommended Decision and Order of the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act, as amended (ERA), 42 U.S.C. § 5851 (1988). The ALJ found the complaint timely as to all of the alleged adverse actions and found that Respondent violated the ERA when it failed to promote Complainant, transferred her, assigned her to demeaning training, and withdrew her certifications to perform certain tests. I find the complaint timely as to two of the alleged discriminatory acts, and further, that Respondent violated the ERA in failing to promote and in withdrawing test certifications. I will restate the relevant facts to focus the discussion.

1. *The facts.*

Complainant Sarah Thomas began working for Respondent, Arizona Public Service Company (APS), as a Radiation Waste Aide at its Palo Verde Nuclear Power Plant in 1983. T. 54. Thomas disliked night shift work because of family responsibilities, and sought a technician position in the group assigned to Section 11 testing [1] within the Engineering Department, since the

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technician job rarely required working at night. T. 55-56. She began working as the Section 11 technician in June 1984. T. 55.

Thomas' supervisor in Section 11 was Ronald Kropp. T. 57. In Thomas' first annual performance appraisal as a technician

(June 1985), Kropp rated her "superior," (the second highest rating), lauded her efforts and ability to work independently, stated that she maintained the section's personal computer (PC), and mentioned her proficiency in using several programs on the PC. CX 6. Writing that Thomas "gives 150% to her job," Kropp successfully recommended a special salary increase for her that year. CX 5; T. 63-64.

Kropp again rated Thomas "superior" in her August 1986 appraisal and specially praised her proficiency on programs on the mainframe time share computer (TSO), her training the engineering aide to use the PC, and her "considerable independence of action as . . . lead technician of a procedure." CX 7. Kropp stated that Thomas "excels at testing and data management and likes to get out in the field and test." *Id.* The 1986 appraisal also mentioned Thomas' need for training on "LLRT testing" [2] to diversify her experience. *Id.*

A difference of opinion arose in Autumn 1986 concerning the date used to schedule retesting of valves within the purview of Section 11. T. 73-74. Thomas believed that when the date for retesting was calculated using the "exercise date" on which each valve was tested, it was clear when the time for retesting elapsed (either 30 or 90 days). T. 72. In 1986, APS began to schedule valves for testing in groups, and the testing period for a group could extend for as long as six weeks. T. 74. Under the new system, all the valves in a group were accepted on the same day ("acceptance date"), and the computer calculated the time for retesting from the acceptance date. *Id.* It was therefore possible that a valve tested at the beginning of a six week period, and accepted at the end of the period, would not be retested within 30 or 90 days because of the length of time between the actual testing of the valve and the acceptance date. T. 74-75.

Thomas raised concern about the use of the acceptance date with Kropp, who was "livid" about Thomas' comments and told her to continue to use the acceptance date. T. 75. She then discussed the issue with the NRC on-site inspector, Jay Ball. T. 76, 96-97. Kropp knew that Ball investigated the same issue that Thomas had raised, but Kropp denied knowing at the time that Thomas had alerted the NRC. T. 361, 405.

Thomas had another difference of opinion with Kropp in Autumn 1986 concerning the correct computer on which to track the valve test data. Initially, the valve data was tracked only on the TSO. T. 77. Kropp wrote a program for the new PC to track

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the data, and for a time, the section used both the TSO and the PC for tracking. T. 77-78. Thomas and lead engineer Gary Irick met with Kropp in November 1986 to air their concern that the PC was unreliable and failed to disclose critical information, and Kropp reacted angrily. T. 81-83. In December 1986, Kropp directed Thomas and Irick to use the PC exclusively to track valve test data. T. 77, 82, 271, 368; CX 9. Also that month, Thomas began to report directly to technical group lead engineer Thomas Weber, who in turn reported to Kropp. T. 68-69.

Kropp walked in during a February 1987 discussion in which Thomas, Irick, and another employee were talking about problems

with the PC-produced information for valve surveillance tracking (called "ST packages"), and Kropp became very angry. T. 83-84, 275; CX 9. Kropp told Thomas and Irick to throw the ST packages in the garbage if they were not properly completed. T. 84, 275. Thomas and Irick testified that NRC regulations required keeping ST packages for the duration of the license of the plant. T. 84-85, 275. Although both Thomas and Irick understood Kropp to mean that they should discard completed ST packages, Kropp stated that he was referring to piles of incomplete ST packages that were crowding the control room. T. 372-373.

Thomas and Irick promptly met with Kropp's supervisor, Gerald Sowers, to discuss the problems with ST packages prepared on the PC and Kropp's statement about discarding them. T. 85-86; CX 9. Sowers directed Thomas to resume using the TSO and feed into it all the data that had been fed only to the PC during the last few months. T. 86, 276; CX 9. Kropp testified that he was hurt that Thomas "had gone behind [his] back" on this issue, T. 369, 371, on which Sowers overruled Kropp, T. 276. Irick testified that Kropp became very angry about being overruled. T. 277.

A month later, while running the data on the TSO, Thomas discovered that three valves that had been "cleared" by the PC as within permissible limits of degradation actually were not, and should have been placed on 30-day testing. T. 80, 90. Thomas and Irick reported the problem to Kropp, who told them to "engineer it away" and did not want them to write a Potentially Reportable Occurrence (PRO) about it. T. 91-92, 279; CX 9. Thomas and Irick went over the work, verified that it was correct, and met with Sowers to inform him of the problem. T. 92, 279-280. Sowers told Thomas and Irick to write a PRO, which was another occasion on which Sowers overruled Kropp. T. 94. Kropp again became angry when he found out that Thomas and Irick had gone over his head. T. 94, 281.

The PRO led to a Licensee Event Report (LER) filed with the

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NRC. CX 11. Thomas and Irick believed that the final version of the LER was not entirely accurate, T. 100-103, and they reported this and sought correction in a May 1987 memorandum to Sowers. CX 9. Thomas and Irick testified that after they met with Sowers, Kropp became unfriendly and avoided any unnecessary conversation with them. T. 87-88, 95, 108, 277.

In her 1987 annual appraisal, Thomas was again rated "superior," this time by Weber, who praised her thorough, meticulous work and completion of assignments ahead of schedule. CX 8.

There were two levels of test technicians in the engineering department: technician and senior technician. Promotion to senior technician, which resulted in higher pay, was "in-family" and did not require a formal application for a vacant position. T. 110. Rather, promotion occurred when the supervisor and his superior approved it. T. 110, 180, 481. Thomas had not yet been promoted to senior test technician at the time of the hearing in 1989.

In view of Thomas' competence at her work, lead engineer Irick believed in early 1987 that Complainant was a senior test technician. T. 120, 287. Irick frequently designated Thomas as

the person to consult when he was not available. T. 120-121, 266. In Spring 1987, Irick recommended that Thomas apply for an open associate engineer position, which was at a higher level than senior test technician. T. 288. [3]

Because of difficulty in communicating with Kropp, Thomas arranged for a member of the personnel department to serve as an intermediary in a meeting in which she informed Kropp of her desire for promotion to senior test technician. T. 183-185. At the meeting, Kropp told Thomas that she was not qualified to be promoted to senior technician and informed her that she needed additional experience, including "cross training" in LLRT, to qualify. T. 384-385, 400. Weber testified that promotion to senior technician required at least six years of experience as a test technician. T. 571, 625-626.

Kropp sent Weber a memorandum on October 1, 1987, reassigning personnel for the purposes of "coverage" in the event of staff departures and for "diversification of training and experience" for the two technicians concerned. CX 14. Effective January 1, 1988, Thomas and technician Larry Trouy swapped positions, with Thomas reassigned to the LLRT section and Trouy reassigned to Section 11. No other engineering department employees have been reassigned between sections to achieve cross-training, either before or after the reassignment of Thomas and Trouy. T. 124, 233, 236-237, 436-437, 644.

Shortly after issuing the reassignment memo, Kropp wrote a memorandum directing the engineering aide to train Thomas on the

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PC, and issued a follow-up memorandum a month later because the training had not occurred. CX 23. Thomas testified that the training was pointless since she already knew how to do the tasks covered by the training memo, and demeaning because the assigned trainer was the aide that Thomas herself had trained to use the PC. T. 659-661.

Thomas disliked the reassignment to LLRT because it involved working night shift, exposure to high radiation levels, and was physically demanding. T. 126-127, 293. In Thomas' first annual appraisal after reassignment to the LLRT section (May 1988), Weber rated Thomas lower than she had been rated each year while working in Section 11. CX 15. While working in LLRT, Complainant received certifications on the following tests: CLO-1 (partial), CLO-3 (partial), CLO-5, CLO-6, and CLO-7. T. 130-134.

In early September 1988, APS issued a directive requiring technicians to use acceptance criteria that had not been officially approved for certain tests. T. 135. Thomas complained about using the non-approved criteria to engineer Jim Cantrell and lead engineer Weber. T. 136-137, 651.

About three weeks later, engineer Cantrell assigned Thomas to perform a specific LLRT test, the CLO-6. T. 139. Complainant testified that because she was feeling ill and lightheaded, she asked Cantrell to assign another technician to accompany her as backup when she went to do the test, but Cantrell denied the request. T. 139, 252. Lead engineer Weber believed Thomas asked for backup in case the test failed. T. 540. On arrival at the location of the test, Thomas discovered that the assigned mechanics had hooked up the test in a manner other than the

standard one. T. 529; RX 14, p. 2. When Thomas asked the mechanics to change the hookup, they became argumentative. T. 597-598. In response to a call from Thomas during the performance of the test, Weber assigned engineer Cantrell and technician Kern to help her. T. 523. While the test progressed, the pressure in one of the valves went higher than recommended but did not cause any damage. T. 530. After Kern's arrival, the mechanics argued with Kern when he instructed them to hook up the test the way Thomas had directed, but the mechanics finally complied, and Thomas successfully completed the test. T. 678-679.

Kropp assigned Weber to report on the CLO-6 test incident. T. 413. Cantrell, who had been present, wrote a report to Weber. See RX 14. In turn, Weber wrote a preliminary report to Kropp, RX 15 (dated September 28, 1988), in which Weber recommended a counseling session and additional training for Thomas, and that Thomas should not perform other tests alone until she completed one additional demonstration test and oral exam on the CLO-6.

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T. 533, 541, 594; RX 15, p. 2. The day after receiving Weber's preliminary report, Kropp notified Thomas that he was suspending her certifications for "all LLRT procedures" pending resolution of the incident and that she would have to have all of her certifications revalidated before she could perform any test alone. CX 32 (dated September 29, 1988). After Kropp sent his memo suspending Thomas' certifications, Weber met with Thomas, who allegedly expressed a lack of confidence in performing certain other tests. T. 534-536. Thomas denied expressing any doubts about her ability to do the tests. T. 666, 692. Weber later sent Kropp a final report in which he recommended the action Kropp had already taken of requiring Thomas to recertify on all of the LLRT tests. RX 16 (dated October 9, 1988).

Thomas underwent retraining and recertification exams on all the LLRT tests, a process which she deemed to be demeaning. T. 135, 419-420. By the time of the hearing, she had been recertified on nearly all the tests. T. 208. She remained assigned to the LLRT section through the time of the hearing, with no mention of a possible return to Section 11. T. 237.

On October 21, 1988, Thomas filed a complaint with the Department of Labor concerning the withdrawal of LLRT test certifications, failure to promote, and harassment on the job.

2. Timeliness of complaint.

During the time at issue, an ERA complainant was required to file a complaint within 30 days after the occurrence of the alleged violation. 42 U.S.C. § 5851(b); 29 C.F.R. § 24.3(b) (1992). [4] Respondent argues that the complaint was untimely except as to the suspension of test certifications. T. 31, 37; Respondent's Brief at 4, 41-47. [5] Thomas relies on the theory of a continuing violation to establish that the complaint was timely for the alleged discriminatory acts that preceded suspension of test certifications. Complainant's Brief at 43. The ALJ found that the complaint was timely as to all alleged discriminatory acts because it was timely concerning the withdrawal of LLRT certifications. R.D. and O. at 2.

The fact that one alleged discriminatory act occurred during the thirty days prior to the filing of the complaint does not in and of itself determine whether, under a continuing violation theory, the complaint was timely as to all of the alleged discriminatory acts. In *English v. Whitfield*, 858 F.2d 957, 962 (4th Cir. 1988), the Court of Appeals held that under the holdings of *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *Chardon v. Fernandez*, 454 U.S. 6 (1981), a complainant under the ERA must file the complaint within 30 days of an alleged discriminatory act if the employer's notice concerning that act was sufficiently "final and unequivocal" in form. In *English*, the employer sent a written disciplinary notice that the

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complainant was temporarily reassigned to another position, during which time she could bid on other available positions, and that she would be laid off if she did not succeed in securing a new permanent position. 858 F.2d at 959-960. The Court found that the notice was final and unequivocal because the means to avoid the consequences of the disciplinary notice (bid on a new permanent position) was "unrelated to its revocation or reexamination by the employer." *Id.* at 962.

When Kropp told Thomas that he would not promote her to senior technician, he said it was because she did not have enough diversified experience, lacked initiative, and was unwilling to work overtime. T. 385, 399-403. Kropp told Thomas she needed cross-training in LLRT to be eligible for promotion. T. 406. Kropp later justified the decision to reassign Thomas to the LLRT section in part because it "dovetailed very nicely with [Thomas'] desire for promotion and . . . afforded her the opportunity that she needed to get cross trained." T. 410. Here, the decision about the requested promotion to senior technician was not "final and unequivocal," as *English* requires, because Kropp implied that additional cross-training could make up for Thomas' purported lack of diversified experience and ultimately qualify her for promotion. Under the *English* analysis, the cross-training to which Thomas was assigned meant that the denial of promotion was not so final that it triggered the filing of a complaint. Compare *McCuiston v. Tennessee Valley Authority*, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 17-18 (unsatisfactory management appraisal, which effectively denied pay increase, sufficiently permanent to trigger awareness of respondent's discriminatory motivation and start 30-day period for filing complaint).

The Secretary has held that the timeliness of a claim may be preserved under the continuing violation theory "where there is an allegation of a course of related discriminatory conduct and the charge is filed within thirty days of the last discriminatory act." *Garn v. Benchmark Technologies*, Case No. 88-ERA-21, Dec. and Order of Remand, Sept. 25, 1990, slip op. at 6; *Egenrieder v. Metropolitan Edison Co./G.P.U.*, Case No. 85-ERA-23, Order of Remand, Apr. 20, 1987, slip op. at 4. For guidance concerning whether alleged discriminatory acts are sufficiently "related" to constitute a course of discriminatory conduct, the Secretary has turned to a case under Title VII of the Civil Rights Act of 1964, *Berry v. Board of Supervisors of*

L.S.U., 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986). See *McCuistion*, slip op. at 16. The *Berry* court listed three factors:

(1) whether the alleged acts involve the same subject matter, (2) whether the alleged acts are recurring or more in the nature of isolated decisions, and (3) the degree of permanence.

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F.2d at 981.

In this case, denial of promotion, reassignment to the LLRT section, and suspension of test certifications involved a common subject matter: obtaining cross-training in LLRT testing. The remaining alleged discriminatory act, assignment to PC training, was dissimilar in subject matter, nonrecurring, and permanent. I find that the assignment to PC training was not a continuing violation and therefore that the complaint was untimely as to that allegation, since the memoranda directing the assignment occurred outside the 30-day limitation period. [6]

The other alleged discriminatory acts that occurred outside the 30 day period require more analysis. The denial of promotion was a recurring act in that it was reflected in regular pay checks that did not include the additional pay of a senior technician. See *Berry*, 715 F.2d at 981, and *Brewster v. Barnes*, 788 F.2d 985, 993 (4th Cir. 1986) (failure to raise salary constituted continuing violation under Equal Pay Act).

The *Berry* court focused to a great degree on whether an allegedly discriminatory act that occurred outside the filing period has

the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate[.]

715 F.2d at 981, quoted in *McCuistion*, slip op. at 18. Applying the *Berry* analysis, I find that the denial of promotion did not have such a degree of permanence as to make Thomas aware that she still would not be promoted, absent continuing discrimination. There is no dispute that the promotion to senior technician could occur whenever the supervisor deemed Thomas qualified and higher management approved. Thus, if Kropp left, Thomas might well have been promoted by his replacement since she obtained the needed cross-training and broader experience Kropp said she lacked. I find that Thomas has established under the continuing violation theory that her complaint was timely as to denial of promotion to senior technician. [7]

In contrast, Thomas' assignment to the LLRT section appeared permanent since the memorandum announcing it did not mention any possibility of her return to Section 11 testing (or Trouy's return to LLRT). See CX 14. As Thomas testified, in the engineering department, prior cross-training assignments had been temporary and accomplished informally without reassigning the employee to a new position. T. 294, 644. In this case, however,

Thomas was officially reassigned to a different position. Also, the memorandum announcing the reassignment indicated that it was

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done not only to give Thomas and Trouy broader experience, but also to provide "coverage" to APS should additional personnel leave. Thus, Thomas was on notice that her reassignment to LLRT was not the kind of temporary, informal cross-training that the engineering department had previously used. I find that under the *English* and *Berry* criteria, the notice of reassignment to LLRT was sufficiently permanent to trigger the filing period, and therefore that the complaint was untimely as to the LLRT assignment. [8]

3. *Liability.*

To make a prima facie case, the complainant in a whistleblower case must show that she engaged in protected activity, that she was subjected to adverse action, and that respondent was aware of the protected activity when it took the adverse action. Complainant must also raise the inference that the protected activity was the likely reason for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8.

Thomas engaged in protected activity when she informed her supervisors about concerns that the PC was unreliable for tracking valve testing, questioned them about the use of the acceptance date for tracking valve tests, met with Kropp's supervisor concerning Kropp's statement that ST packages should be thrown out, and raised with her superiors the issue of using non-approved criteria for an LLRT test. These internal safety complaints to management are protected activity under the whistleblower provision in the ERA. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); but see, *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984).

Thomas also engaged in protected conduct when she spoke with an NRC inspector concerning the use of the acceptance date for tracking valve testing and persisted on the valve testing problem that ultimately led to filing an LER with the NRC. See *supra* at 5-6; *Kansas Gas & Elec.*, 780 F.2d at 1510-1513 (protection afforded during all stages of participation in order to maintain integrity of administrative process in its entirety); *Poulos*, slip op. at 6 (preliminary steps in proceeding that could expose employer wrongdoing are protected activity under analogous whistleblower provision of Clean Air Act).

Complainant established adverse action in the denial of promotion to senior test technician and suspension of test certifications, which required her to undergo a demeaning recertification process. See generally *English v. Whitfield*, 858 F.2d at 963 (retaliatory harassment claim is cognizable under the ERA), *Pogue v. U.S. Dept. of the Navy*, Case No. 87-ERA-21,

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Final Dec. and Order, May 10, 1990, slip op. at 51 (transfer to

less desirable job constitutes adverse action), *rev'd on other grounds, Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287 (9th Cir. 1991), and *Scerbo v. Consolidated Edison Co. of New York*, Case No. 89-CAA-2, Dec. and Order, Nov. 13, 1992, slip op. at 5-6 (*id.*). [9]

APS was aware of Thomas' protected activities when it took the adverse actions. Kropp knew of Thomas' concerns about using the acceptance date and the PC for valve test tracking before he denied the requested promotion and suspended her test certifications. Moreover, Thomas established that Kropp reasonably suspected that she had complained to the NRC about the acceptance date issue, because Kropp admitted that he knew the NRC inspector was examining the same issue. In addition, Weber was aware that Thomas questioned the use of non-approved test acceptance criteria just before her test certifications were suspended.

In making a *prima facie* case, temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference that the protected activity was the motivation for the adverse action. About one year elapsed between the time Kropp learned of Thomas' safety concerns regarding use of the acceptance review date and the PC for test tracking (Autumn 1986), and the denial of promotion (September 1987). APS suspended Thomas' test certifications three weeks after she made internal complaints about using non-approved acceptance criteria. Thus, Thomas introduced evidence sufficient to raise an inference that her protected activities motivated the adverse actions against her. See *Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992, slip op. at 11-12, *reversed on other grounds sub nom. Ebasco Constructors, Inc. v. Martin*, No. 92-4567 (5th Cir. Feb. 19, 1993) (causation established where seven or eight months elapsed between protected activity and adverse action); see also *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity sufficient as a matter of law to establish final element in a *prima facie* case). Thus, I find that Thomas made a *prima facie* case that APS violated the ERA when it denied her promotion and suspended her test certifications.

Once Complainant established a *prima facie* case, the burden shifted to Respondent to articulate legitimate, nondiscriminatory reasons for the adverse action. *Dartey*, slip op. at 8. APS met this burden. Kropp stated that he did not promote Thomas to senior technician because she needed broader experience, additional cross-training in LLRT testing, and more initiative to qualify. T. 400-402. Kropp justified withdrawing all of Thomas' test certifications because he believed that she expressed a lack

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of confidence in performing LLRT tests, and stated all of that the tests were similar to the one on which she experienced difficulty. T. 414-416.

Complainant had the ultimate burden of persuading that the legitimate reasons articulated by APS were a pretext for discrimination, either by showing that the unlawful reason more likely motivated APS or by showing that the proffered explanation

is unworthy of credence. *Dartey*, slip op. at 8. At all times, Thomas had burden of showing that the real reason for the adverse action was discriminatory. *Pillow v. Bechtel Construction, Inc.*, Case No. 87-ERA-35, Dec. and Order of Rem., July 19, 1993, slip op. at 14.

a. *Denial of promotion to Senior Test Technician.*

Kropp testified that he denied Thomas' request for promotion to senior technician because she supposedly lacked sufficiently broad experience, especially in field testing, as well as initiative and willingness to work overtime. But Kropp admitted that in 1987 there were no occasions for Thomas to work overtime and therefore willingness to work overtime was not a factor in the promotion decision. T. 400. And Thomas' 1985, 1986, and 1987 performance appraisals consistently lauded her initiative and independence of action, which Kropp said Thomas lacked in 1987. R.D. and O. at 11; CX 5, 6, and 7. Moreover, Thomas' 1986 appraisal mentioned her excellence in testing, CX 7, and Thomas testified that she had extensive experience in testing prior to her request for promotion. T. 642-643.

Based on Thomas' competence, Irick believed in early 1987 that she already was a senior technician and was qualified to be an Associate Engineer, a position higher than senior technician. Irick stated that Thomas "was the only technician on the floor that I knew of, that had done as wide[] a different amount of testing, was as proficient as she was, knew the plant as well as she did. . . ." T. 287-288.

Weber opined that promotion to senior test technician required six years' experience as a test technician, or even more years if the technician lacked broad experience. T. 625. But Thomas established that other technicians with narrower experience and less seniority than she had been promoted to senior technician. T. 111-112, 189-191; Ex. 1 to Complainant's Brief. [10] Moreover, as the ALJ found, R. D. and O. at 10, engineer Gary Irick had others consult Thomas in his absence. Since APS ranked Complainant fifth of seventeen applicants for the associate engineer position, she clearly was qualified to be a senior test technician, as the ALJ found. [11] *Id.*

Based on all the evidence, I agree with the ALJ that the reasons proffered by APS for denying Thomas promotion to senior test technician were not credible. I find that Thomas has

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sustained the burden of persuading that the real reason she was not promoted was Kropp's resentment that she engaged in protected activities that made him look bad. I thus find that APS discriminated against her in failing to promote her to senior test technician. [12]

b. *Suspension of LLRT test certifications.*

Whether it was the fault of the assigned mechanics or of Thomas, there is no dispute that Thomas had some difficulty in completing the CLO-6 test and required assistance on September 26, 1988. As a result, Weber initially recommended that Thomas not perform tests by herself until she satisfactorily demonstrated her proficiency on the test at issue, CLO-6. RX 15. However, Weber's supervisor, Kropp, immediately suspended Thomas' certifications for all of the LLRT tests pending resolution of the incident. CX 32 (Kropp memorandum of 9-29-88). In a

final report issued after Kropp had suspended all of the certifications, Weber recommended that Thomas be required to recertify on all of the LLRT tests allegedly because she had expressed a lack of confidence in performing tests CLO-1 (electrical), CLO-4, CLO-5, and CLO-6. RX 16. Thomas denied expressing a lack of confidence concerning the tests. T. 666, 690, 692.

Kropp testified that he required Thomas to recertify on all of the tests because the other tests were so similar to the CLO-6 test that presumably she would have difficulty performing them. T. 414-415. Kropp testified that he also relied on Weber's report that Thomas was not confident about her ability to do all the tests. T. 414.

The ALJ credited Thomas' testimony that she never expressed a lack of confidence on the tests. R. D. and O. at 13. I find no basis in the record to overturn his judgment of the witnesses' credibility. *Spencer v. Hatfield Electric Co.*, Case No. 86-ERA-33, Final Dec. and Order, Oct. 24, 1988, slip op. at 3-4. Indeed, I find it highly suspect that Kropp did not himself interview Thomas about the incident, but rather relied solely upon Weber's report of Thomas' views. In addition, I also find it suspect that Weber changed his initial recommendation of requiring recertification on one test to requiring recertification on all of the tests only after his supervisor, Kropp, had suspended certifications on all the tests.

I agree with the ALJ that it was reasonable for Kropp to require Thomas to recertify on the CLO-6 test because she experienced difficulty in completing that test. As for requiring her to recertify on the other tests, however, I find that the basis asserted by APS was a pretext for discrimination. One of the tests on which Thomas was required to recertify, the CLO-5, does not even use the same test panel as the CLO-6. T. 645.

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Therefore, Kropp's fear that Thomas could not adequately perform any of the tests because on one occasion she had difficulty in performing the CLO-6 test, is simply not credible. I find that Thomas established pretext and demonstrated that APS withdrew the other test certifications because of her protected activities. I further find that the required recertification process, which was unique to Thomas, T. 415, was humiliating to her. T. 132, 135.

4. Relief

In the event that a respondent is found to have violated the ERA, "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment" 42 U.S.C. § 5851(b)(2)(B). See generally *Wells v. Kansas Gas & Elec. Co.*, Case No. 85-ERA-0072, Sec'y Final Dec. and Ord., Mar. 21, 1991, slip op. at 17. In addition, "the Secretary may order such person to provide compensatory damages to the complainant" and shall assess costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint. *Id.*; *DeFord v. Secretary of Labor*, 700 F.2d 281, 288-289, 291 (6th Cir. 1983).

a. Back pay.

To abate the violation, APS shall promote Thomas to senior test technician, retroactive to October 1, 1987. APS shall correct Thomas' personnel records to show the October 1, 1987 promotion.

The ALJ ordered the parties to attempt to agree on the appropriate pay level for Thomas as a senior test technician, and to determine the additional amount of pay Thomas would have earned since October 1, 1987. The parties have not indicated any agreement. The record contains only Thomas' estimate that she is entitled to \$6,500 in back pay to compensate her at the pay rate for senior test technician from May 1987 until the hearing in March 1989. See T. 112-113, 180-181.

APS shall establish and effectuate the correct pay rate for Thomas as a senior test technician as of the date of compliance with this order. APS shall pay Thomas back pay from October 1, 1987 until the date of compliance by subtracting the amount of pay Thomas received from the amount of pay she should have received as a senior test technician. Interest shall be calculated as outlined at p. 29.

b. *Compensatory damages.*

APS moved to strike the discussion concerning compensatory damages in Thomas' brief on the ground that it is an extra-record submission. Motion to Strike Exhibit 1 and Discussion Concerning Alleged 'Compensatory Damages' from Complainant's Brief. In the brief, Thomas assigned specific dollar amounts to the elements of

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mental and physical anguish about which she testified at the hearing. See, e.g., T. 132, 135 (feeling humiliated when her LLRT test certifications were suspended). In view of Thomas' testimony about the humiliation she felt, I deny this motion to strike. [13]

Where a violation has been found, the ERA permits the award of compensatory damages in addition to back pay. [14] 42 U.S.C. § 5851(b)(2)(B); 29 C.F.R. §24.6(b)(2) (1992). *DeFord v. Secretary of Labor*, 700 F.2d 281, 288 (6th Cir. 1983); *English*, 858 F.2d at 964. Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. *DeFord*, 700 F.2d at 283; *Webb v. City of Chester, Ill.*, 813 F.2d 824, 836-837 and nn. 3,4 (7th Cir. 1987).

The ALJ found the "evidence insufficient in this case to recommend" an award of compensatory damages. R.D. and O. at 15. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. *Lederhaus v. Donald Paschen, et al.*, Case No. 91-ERA-13, Final Dec. and Order, Jan. 13, 1993, slip op. at 10, and cases there cited. The testimony of medical or psychiatric experts is not necessary, but it can strengthen a Complainant's case for entitlement to compensatory damages. *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir.), cert. denied, 454 U.S. 897 (1981).

While I find that Thomas' testimony was sufficient to establish entitlement to compensatory damages, the demonstrated humiliation concerning the withdrawal of her test certifications does not justify the full amount of damages she seeks for it,

\$5,000. Thomas was not discharged and, although she was forced to undergo a demeaning recertification process, by the time of the hearing she had successfully recertified on nearly all the tests. I find that Thomas is entitled to ,000 as compensatory damages for her humiliation. Compare, *Lederhausen*, slip op. at 11-14, and *McCuiston*, slip op. at 18-22 (compensatory damages of \$10,000 for depression, behavior changes, and monetary difficulties resulting from discriminatory discharge); *Johnson, et al. v. Old Dominion Security*, Case Nos. 86-CAA-3, *et seq.*, Sec. Dec., May 29, 1991, slip op. at 25-28 (compensatory damages of \$2500 for each of three discharged Complainants who had sustained prolonged exposure to chemicals that caused flu-like symptoms, skin irritation, and in one case gland enlargement); *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Final Order on Comp. Damages, Aug. 16, 1993, slip op. at 4-5 (compensatory damages of \$5000 for depression and other effects of discharge).

ORDER

Respondent APS is ordered to:

1. Promote Complainant to Senior Test Technician,

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retroactive to October 1, 1987, and correct Complainant's personnel records to so reflect.

2. Pay Complainant back pay from October 1, 1987 through the date of compliance with this order, calculated pursuant to the discussion at p. 26, *supra*, with interest thereon computed in accordance with 26 U.S.C. § 6621 (1988).

3. Pay Complainant ,000 in compensation for humiliation suffered as the result of Respondent's discriminatory treatment concerning recertification on LLRT tests.

4. Pay to Complainant's counsel the costs and expenses involved in bringing this complaint plus a reasonable attorney's fee. The costs involved in submitting pleadings or documents that have not been accepted as part of the record should not be included.

Counsel for Complainant is permitted a period of 20 days in which to submit to the Secretary any petition for costs, expenses and fees incurred in bringing this complaint. Respondent thereafter may respond to any petition within 20 days of its receipt.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] "Section 11" refers to a portion of the code of the American

Society of Mechanical Engineers, which is incorporated in APS' license to operate the Palo Verde plant.

[2] "LLRT" stands for local leak rate testing.

[3] Thomas later applied for an associate engineer opening and was ranked fifth out of 17 candidates. T. 384. She initially alleged that the failure to promote her to associate engineer was a discriminatory act, but dropped that allegation at the hearing.

T. 180. Complainant introduced evidence concerning Kropp's treatment of her absenteeism when he rated her qualifications for the Associate Engineer position and contends that he rated her lower than another employee with a substantially similar record of absenteeism.

[4] Section 2902(b) of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, amended the time period for filing a complaint to 180 days for claims filed on or after the date of its enactment, October 24, 1992. See Section 1902(i) of Pub. L. 102-486. Thomas filed her complaint in 1988.

[5] Reference is to "Respondent's Post-Hearing Brief on Exceptions to ALJ's Recommended Decision."

[6] I note that evidence of discriminatory actions antedating the filing period but not found to be continuing violations nevertheless may constitute relevant background evidence. "Evidence of past practices may illuminate . . . present patterns of behavior." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989), quoted in *McCuistion*, slip op. at 18.

[7] The Ninth Circuit, whose decisions are controlling in this case, also recognizes that a finite event such as the failure to promote may constitute a continuing violation when the discriminatory policy against promotion continues until the filing of the complaint. *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir.), cert. denied, 459 U.S. 971 (1982).

[8] Respondent raises another timeliness issue, contending (Respondent's Brief at 14) that the Department of Labor violated its own regulations and deprived APS of due process of law when the ALJ issued the R.D. and O. outside the 20-day time limit of 29 C.F.R. § 24.6(a) (1989) and the Secretary did not issue a final decision within 90 days of the receipt of the complaint, as provided by 29 C.F.R. § 24.6(b). The ERA provides no consequences, however, for failure to meet the short decisional deadlines. The time limits are directory, and not jurisdictional. *Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Dec. and Order of Rem., Apr. 27, 1987, slip op. at 12. See also *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991) (case under analogous employee protection provision of the Surface Transportation Assistance Act) and *Brock v. Pierce County*, 476 U.S. 253, 259 and n.6 (1986) (Comprehensive Training and

Employment Act). Therefore, APS' due process rights have not been violated in this case.

[9] The ALJ also discussed two memoranda from APS managers that he found were not "aimed at Thomas specifically, but which could be interpreted as discouraging free contact with the NRC." R. D. and O. at 13. The ALJ ordered Respondent to issue corrective memoranda. R. D. and O. at 16.

The first memorandum, issued April 11, 1988, arguably occurred outside the 30 day filing limit. Even assuming that the memorandum was still in effect during the 30 day period prior to the filing of the complaint, and thus possibly could be considered as a continuing violation, the memorandum did not constitute adverse action against Thomas. The memorandum was not addressed specifically to her, but rather to all engineering department personnel. See CX 18. Thomas received the memorandum in her mailbox, as did the other department members. T. 149. Thomas did not state that the memorandum prevented her from contacting the NRC. Rather, she testified that even after the memorandum was issued, she raised a safety issue with the NRC. T. 127; see CX 13 concerning a November 1988 contact with NRC. Thus, there was no evidence that the memorandum was adverse to Thomas.

The second memorandum, distributed to employees other than Thomas, was issued after Thomas filed this complaint. See CX 17, dated January 18, 1989. Again, Thomas did not testify that the second memorandum deterred her from contacting the NRC. Since Thomas did not show that either memorandum affected her adversely, she did not establish a prima facie case that issuing the memoranda violated the ERA.

[10] The hearing in this case closed on March 2, 1989. Thomas attached as Exhibit 1 to her Brief before the Secretary a print-out dated September 1989 indicating that employee Larry Trouy was a senior test technician. Thomas cited Exhibit 1 as additional evidence that APS did not have a uniform requirement of six years of technician experience to be promoted to senior test technician.

APS moved to strike the exhibit on the ground that 29 C.F.R. § 18.54(a) and (c) provide that the record is closed at the conclusion of the hearing, absent a showing that new and material evidence became available which was not available prior to the close of the hearing.

Prior to the hearing, Thomas sought the personnel records of Larry Trouy. See subpoenas to APS Custodian of Records dated February 3 and February 17, 1989. APS did not produce the requested records. See Respondent's Motion for a Protective Order or an Order to Quash the Custodian of Records Subpoena issued February 3, 1989, filed on February 13, 1989, and APS' Motion to Quash Subpoena Directed to Custodian of Records dated February 17, 1989. See also T. 16-17.

In view of Complainant's pre-hearing requests for Mr. Trouy's personnel records and the fact that APS failed to produce them, I find that Exhibit 1 was not available to Thomas prior to the close of the hearing and became available since the hearing. Accordingly, I will admit Exhibit 1, which is made a part of the record in this case.

[11] At the hearing, Thomas dropped the allegation that the failure to promote her to associate engineer was discriminatory. T. 180. She introduced evidence demonstrating, however, that in rating the applicants for that position, Kropp treated her absenteeism record more negatively than the similar record of another candidate. Compare RX 5 (Thomas rating) with CX 41 (rating of the selected applicant). Kropp admitted under cross examination that he treated the "minus sign" for Thomas' absenteeism as disqualifying her, whereas he did not treat the selected candidate's minus sign the same way. T. 425-428. I agree with the ALJ's finding, R. D. and O. at 11, that Kropp's treatment of Thomas' absenteeism showed discrimination against her.

[12] The meeting at which Thomas requested and was denied a recommendation for promotion to senior technician occurred in September or October 1987. T. 193-194. The ALJ's finding that Thomas should have been promoted no later than October 1987, R.D. and O. at 15, is therefore reasonable.

[13] I grant "Respondent's Motion to Strike Complainant's Unauthorized Pleading Submitted in May 1990." Under the rules governing hearings before ALJs, 18 C.F.R. Part 24, and the Briefing Order in this case, the last authorized pleading was Respondent's Post-Hearing Reply brief, submitted in January 1990. Complainant's March 1990 letter-brief will remain in the file, but it is not a part of the official record and I have not relied upon it in reaching this decision. The letter-brief discusses the admissibility of "Exhibit 1," which I have accepted into the record, see n.9, *supra*, and contains additional argument.

In deciding this case, I also have not considered two other post-briefing submissions, Complainant's January 14, 1993 letter, and Respondent's February 22, 1993 responsive letter.

[14] Thomas sought \$5,000 for the humiliation she suffered when APS stripped all of her LLRT certifications. Comp. Br. at 42. She also sought compensatory damages because of her transfer to the LLRT section. Since she did not complain timely about the transfer, she is not entitled to compensatory damages concerning its effect on her.